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DEATH DUTIES ON GIFTS WITH STRINGS

by
P. R. ADAMS, LL.M.
Barrister and Solicitor of the Supreme Court of Western Australia

The recent decision of the Privy Council in *Chick* v. *Commissioner of Stamp Duties*, [1958] 2 All E.R. 623, is a timely reminder that death duties on what, at first sight, may appear to be straightout gifts, are not necessarily avoided by lapse of time. This case arose under the N.S.W. *Stamp Duties Act* 1920-1956, s. 102 (2) (d), which seems to have a counterpart in more or less similar words in most, if not all, of the other States. In Western Australia the relevant provision is s. 74 (2) (b) of the *Administration Act* 1903-1956. The N.S.W. subsection reads:—

> "For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:—
>
> (2) . . . (d) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of the Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

Bona fide possession

The material facts can be briefly stated. On 19 February 1934 the deceased transferred by way of gift to his son, the appellant, a property, "Mia Mia", together with the improvements thereon. This gift was made without reservation or qualification or condition. The donee was then living in a homestead erected on the property and continued to do so until the death of the deceased. It was not in dispute that he assumed bona fide possession and enjoyment of the property immediately on the gift to the entire exclusion of the deceased or of any such benefit to him as is mentioned in paragraph (d). The question was whether he also thenceforth retained it, and this depended on the impact of paragraph (d) on the following facts:

Partnership

On 25 July 1935, some seventeen months after the gift, the deceased and the appellant, and another son, entered into an agreement to carry on in partnership the business of graziers and stock dealers under the name or style of John Chick & Sons. The agreement provided (by cl. 1) that the partnership should commence, or be deemed to have commenced, on 1 July 1935 and, subject to the conditions thereof, should continue until dissolved in manner thereinafter appearing, (by cl. 2) that the deceased should

be the manager of the said business and that his decision should be final and conclusive in connexion with all matters relating to its conduct, (by cl. 4) that the capital of the business should consist of the livestock and plant then owned by the respective partners or thenceforth to be acquired in connexion with the business, (by cl. 5) that the said business should be conducted on the respective holdings of the partners and such holdings should be used for the purposes of the partnership only, (by cl. 12) that the partnership might be terminated as therein mentioned, and (by cl. 13) that any and all lands held by any of the partners at the date of the agreement or acquired afterwards should be and remain the sole property of such partner and should not on any consideration be taken into account as or deemed to be an asset of the partnership and any such partner holding any such land should have and retain the sole and free right to deal with the same as he might think fit.

In pursuance of this agreement, each of the partners brought into the partnership livestock and plant previously owned by him. Each of them also at the date of the agreement owned a property (the property of the appellant being "Mia Mia"), and their three properties were thenceforth used for the depasturing of the partnership stock. This continued up to the death of the deceased. In computing the final balance of his estate for the purposes of the Act, the Commissioner of Stamps included the value of "Mia Mia". He contended that the facts which have been stated precluded the appellant from claiming that the bona fide possession and enjoyment of the property, though it might have been assumed by the donee immediately on the gift, was thenceforth, that is at all times until the death of the deceased, retained by him to the entire exclusion of the deceased or any such benefit to him as is mentioned in paragraph (d). The Supreme Court upheld this contention. The appellant appealed to the Privy Council, which agreed with the Supreme Court and dismissed the appeal.

Objective and outward facts

The respondent Commissioner took his stand on the plain words of the section. How, he asked, could it be said that the deceased was entirely excluded from the property, the subject of the gift, or from the possession and enjoyment thereof, when, for some seventeen years before his death he had been a member of a partnership whose right it was to agist their stock on it, and himself moreover was the manager of the partnership business with the power to make final and conclusive decisions on all matters relating to it. The "objective and outward facts" (to use an expression of ISAACS, J., in *New South Wales Stamp Duties Comrs.* v. *Thomson* (1927), 40 C.L.R. 394) were,

he urged, wholly inconsistent with such exclusion. To this simple presentation of the case no adequate answer, as it appeared to their Lordships, was given by the appellant. Whatever force and effect might be given to cl. 13 of the partnership agreement, on which the appellant appeared to place some reliance, other parts of the agreement and, in particular cl. 5, put it beyond doubt that the partners and each of them were in possession and enjoyment of the property so long as the partnership subsisted.

Munro's Case

In answer to the respondent the appellant pointed out that in the somewhat similar case of *Munro* v. *Commissioner of Stamp Duties*, [1934] A.C. 61, the Privy Council had held that no duty was payable on the gift. The facts in Munro's case were as follows:

In 1909, M., the owner of 35,000 acres of land in New South Wales on which he carried on the business of a grazier, verbally agreed with his six children that thereafter the business should be carried on by him and them as partners under a partnership at will, the business to be managed solely by M., and each partner to receive a specified share of the profits. In 1913, by six registered transfers in the form prescribed by the *Real Property Act* 1900, M. transferred by way of gift all his right title and interest in portions of his land to each of his four sons and to trustees for each of his two daughters and their children. The evidence showed that the transfers were taken subject to the partnership agreement, and on the understanding that any partner could withdraw and work his land separately. In 1919 M. and his children entered into a formal partnership agreement, which provided that during the lifetime of M. no partner should withdraw from the partnership. On the death of M. in 1929 the land transferred in 1913 was included in assessing his estate for death duties under the *Stamp Duties Act* 1920-1931 (N.S.W.) on the ground that they were gifts dutiable under s. 102 (2) (a) of that Act.

It was held by the Privy Council, reversing the decision of the Supreme Court of New South Wales, that the property comprised in the transfers was the land separated from the rights therein belonging to the partnership, and was excluded by the terms of s. 102 (2) (a) from being dutiable, because the donees had assumed and retained possession thereof, and any benefit remaining in the donor was referable to the partnership agreement of 1909, not to the gifts. It was further held that the fact that the transfers did not mention the rights of the partnership (and therefore under s. 42 of the *Real Property Act* 1900 (N.S.W.) might in law give a title free from those rights) was not material, because the substance of

the transaction had to be ascertained, as liability to taxation ought not to be based upon refinements but on clear words.

Owens' Case

Munro's Case came under the notice of the High Court and was distinguished in *Commissioner of Stamp Duties* v. *Owens* (1953), 88 C.L.R. 67, the facts of which were that in 1930 O., who owned two grazing properties, Ningear and Wallaroi, entered into a verbal agreement with his son, L.H.O., that they should work and manage the two properties in common, the arrangement being that the two properties were to remain in the ownership of O., that each was to contribute towards the purchase of livestock and that they were to share the profits and losses in the proportion of two-thirds to O. and one-third to L.H.O. All livestock which was purchased while this arrangement was in force was owned in the same shares. O. and L.H.O. worked under this arrangement until 1935, when O. made a gift of Wallaroi to L.H.O., who became the registered proprietor for an estate in fee simple thereof. O. informed L.H.O. (very unwisely as it turned out) that the gift was free of any conditions requiring him to remain and work the properties under the arrangement between them and that he was free, if he so desired, to commence grazing pursuits on his own behalf. L.H.O., however, agreed to continue working the two properties on the same basis as formerly except that the profits and losses were to be divided equally between them. After 1935, O. and L.H.O. contributed in equal shares to the purchase of the stock, which was depastured on the two properties, but otherwise the arrangement was carried on until O.'s death in 1946.

The High Court (DIXON, C.J., WEBB and KITTO, JJ.; WILLIAMS and TAYLOR, JJ. dissenting) held that on these facts the gift was of an estate in fee simple carrying the fullest rights known to the law of exclusive possession and enjoyment; that the benefits which L.H.O. allowed O. to derive were incompatible with an exclusive assumption and retention by L.H.O. of possession and enjoyment, and that the value of the property was therefore properly included under s. 102 (2) (d) of the *Stamp Duties Act* 1920-1949 in the dutiable estate of O.

Doctrine of complete exclusion

The High Court distinguished *Munro's Case* on the ground that there the gift was one shorn of certain rights which remained in the donor, whereas in *Owens' Case* the gift was made of a fee simple not subject to any rights, and subsequently the donor re-acquired a certain interest as a result of which the gift became dutiable. It is clear from *Chick's Case* that once a donor has made a gift of the fee simple he must never have any further right or

interest in the property. If he does, it is dutiable as part of his estate. No argument based on "independent commercial transaction" or "full value" will avail his executors.

As long ago as 1912, in *Lang* v. *Webb* 13 C.L.R. 503, the High Court emphasised this doctrine of complete exclusion. In that case the testatrix gave certain land to her sons and on the same day took leases from them. ISAACS, J. pointed out that the leases gave the donor possession, which is a simple negation of exclusion, and brought the case within the statutory liability under the Victorian *Administration and Probate Act* 1903, s. 11. The argument that the rent was full value was held unimportant.

Facts determining subject matter of gift

The distinction between *Chick's Case* and *Munro's Case* is a fine one and means that on each particular set of facts it is a matter of determining the subject matter of the gift.

In the words of VISCOUNT SIMONDS, in delivering the judgment in *Chick's Case*, at p. 626, "If, as in *Munro's Case*, the gift is of a property shorn of certain of the rights which appertain to complete ownership, the donor cannot, merely because he remains in possession and enjoyment of those rights, be said within the meaning of the section not to be excluded from possession and enjoyment of that which he has given. This view of the section, which was re-affirmed in *St. Aubyn* v. *A.G.*, [1951] 2 All E.R. 473, at p. 478, on a consideration of a similar section in a British statute need not be further elaborated."

Entire exclusion

In *Commissioner of Stamp Duties* v. *Perpetual Trustee Co.*, [1943] 1 All E.R. 525; A.C. 425, a settlor vested certain shares in trustees, of whom he was himself one, upon trusts for the benefit of an infant son but with a resulting trust to himself if the son did not attain 21 years. The contention of the Commissioner was that the donor had not entirely excluded himself from the gift or from any benefit. This contention failed. As DIXON, J. said in the same case in the High Court: "The settlement contained nothing defeating, revoking or destroying any interest given. It contained no reservation out of the interest given and no recompense or benefit in reference to the interest given." LORD RUSSELL OF KILLOWEN, in delivering the judgment of the Privy Council (at p. 446), made it clear that the entire exclusion of the donor from possession and enjoyment which is contemplated by the legislation, is entire exclusion from the beneficial interest in property which has been given by the gift and that possession and enjoyment by the donor of some beneficial interest therein which he had not included in the gift does not make the gift dutiable. "Gift" in the context of this legislation

means beneficial gift. A person who declares trusts of property only gives the beneficial interests covered by the trusts. A donor who retains something he has never given does not bring himself within this revenue field.

Gift of partial interest

It follows that a gift of a partial interest in property, the donor retaining the residual rights, is not caught for duty. If an intending donor of a farming property, as part of a plan for a family partnership wishes to give a fee simple and avoid duty he must first establish a proper partnership with the intending donee making the land available for the partnership use. The gift of the land, or a share in the land, when made should be made expressly subject to the rights of the partnership. This may be done either by an agreement in regard to the gift and also perhaps more publicly by lodging the gift transfer subject to a caveat previously lodged by the partnership to protect its "tenancy". The decision in *Oakes* v. *Commissioner of Stamp Duties* (*N.S.W.*), [1954] A.C. 57, indicates that there are other methods of making similar gifts and avoiding duty although the procedure in that case (a trust for children who were minors) may not commend itself to many owing to the income tax implications which would be raised by s. 102 of the Income Tax Assessment Act. In that case the donor declared himself a trustee of his grazing property on trust for his four children in equal shares. The trust deed gave him wide powers of management, power to apply children's shares for the maintenance and education and power to remunerate himself for management. On the death of the donor the gift was attacked under s. 102 (2) (d) of the N.S.W. Stamp Duties Act on the grounds that the donor stayed in possession as trustee, and that the donor's power to apply children's shares for maintenance and to remunerate himself were "a benefit". Both the High Court and the Privy Council rejected this argument and held that the gift was not dutiable.

State statutes

In dealing with the Western Australian Act it is interesting to note that s. 74 (2) (b) is in very similar terms to s. 11 of the Victorian *Administration and Probate Act* 1903, which was under consideration in *Lang's Case* (*supra*) and speaks of a gift . . . "relating to any property" of which . . . bona fide possession and enjoyment has not been assumed and thenceforward retained to the entire exclusion of the donor and makes "the property to which the gift relates" chargeable. It seems clear from the judgment in *Lang's Case* that if the gift had been of a reversion after a lease for years, and not a gift of the fee followed by a lease, the result may have been very different.

The writer takes the view that the difference in wording between the Western Australian Act and the N.S.W. Act is not material when considering this question of gifts during lifetime, and what is suggested above as a solution to this problem applies with equal force to those States where the statutory provision follows s. 11 of the Victorian Act of 1903 rather than s. 102 (2) (d) of the N.S.W. Act. It is true that the Western Australian Act includes certain words which are not in the N.S.W. Act or the Victorian 1903 Act. The Western Australian Act speaks of the "entire exclusion of the person making the same *and without reservation to that person* of any benefit to him by contract or otherwise".

The N.S.W. and Victorian Acts substitute "or" for the words in italic so as to read "entire exclusion of the person making the same or of any benefit to him . . ."

Mortmain Act

As ISAACS, J. pointed out in *Lang's Case* the phraseology of all this legislation is apparently founded upon that of the *Mortmain Act* (9 Geo. II C. 36), s. 1, and modified to meet the circumstances. By the statute, charitable gifts were avoided unless made to take effect in possession immediately and without any reservation for the benefit of the donor. SIR WILLIAM GRANT, M.R., in *A.G.* v. *Munby* (1816), 1 Mer. 327, held valid a charitable gift by a person who was the Rector of Gilling, which was in trust for the Rector of Gilling for the time being. The Master of the Rolls said that the enjoyment under the trust was no longer an enjoyment as owner but accidental as attached to the situation in which he happened to be placed, i.e., the rectorship. The grantor, he held, had parted absolutely with the subject of his donation; that the grant itself contained no reservation in favour of the grantor in his individual capacity, and consequently the case was not caught by the Act.

Present legislation

Commenting on this case, ISAACS, J. said: "The present legislation, however, fills the gap with added provisions. The possession and enjoyment must be assumed and retained 'to the entire exclusion of the donor or of any benefit to him by contract or otherwise'. The exclusion of the donor, and the words 'by contract or otherwise' are intended to prevent what was possible under the Statute of Mortmain."

It would appear from this that the additional words in the Western Australian Act referring to "reservation" of any benefit add nothing to the effect of the section and that to all intents and purposes this section has the same effect as the N.S.W. Act and Victorian 1903 Act and the cases thereon are equally applicable in Western Australia.

TRUST DEED OF HOLDING COMPANY*

THIS TRUST DEED is made the —— day of —— 1958 Between [*holding company*] having a registered office at [——] (hereinafter called "the holding company") of the one part AND [*owning company*] having a registered office at [——] (hereinafter called "the owning company") of the other part:—

WHEREAS:—

(a) the holding company holds certain shares in companies as trustee for the owning company;

(b) it is contemplated that there may be dealings with the said shares and that from time to time the holding company may hold further and additional shares in the capital of companies in trust for the owning company either in substitution for, as a remainder of, or in addition to the said shares;

(c) the parties desire by this deed to record the holding and ownership of shares presently and in the future held and to be held by the holding company for the owning company.

NOW THIS DEED WITNESSETH and the holding company doth hereby declare:—

1 The shares described in the columns numbered I, II, III, and IV of the Schedule hereto are at the date of this deed held by the holding company in its name and so that:—

(a) the Scrip Certificate for each parcel of shares so held is set forth in the Column numbered I;

(b) The number of shares in each such parcel of shares is set forth in the Column numbered II;

(c) The serial numbers of the shares in each such parcel of shares is set forth in the Column numbered III;

(d) The name of the company in which each such parcel of shares is held is set forth in the Column numbered IV;

(e) Authorized dealings with the said shares and any parcel of them from time to time as the case may require in pursuance of the intention of this deed shall be set forth in the Column numbered V;

(f) The date of each such dealing shall be set forth in the Column numbered VI; and

(g) Each such dealing shall be and shall be sufficiently authenticated by the signature of a duly authorized officer, director or chairman of directors or by the

* Contributed by F. T. CROSS, *Barrister-at-Law*, Brisbane.

proper affixing of the seal of the company and the authority of any person signing or affixing the seal of the company shall as against the holding company be conclusive.

2. Further acquisitions of shares by the holding company for and on behalf of the owning company whether in addition to the shares hereinbefore referred to or in substitution therefor shall in like manner be inserted and set forth in the Second Part of the Schedule below the words "New or Additional Shares" and each such entry shall be authenticated as aforesaid.

3. All the shares now held by the holding company as mentioned in the first paragraph hereof are held by the holding company as trustees for the owning company as the beneficial owner thereof and not otherwise and save as trustee the holding company has no interest therein.

4. The like entry of the description of new or additional shares in the schedule shall imply and mean that such new or additional shares are held by the holding company solely as trustee as aforesaid and without beneficial interest in the holding company and not otherwise.

5. In respect of the shares at any time set forth in the Schedule in either of its parts and not shown as having been dealt with (and then only to the extent actually dealt with) the holding company will in all respects act upon and follow strictly all lawful directions and instructions of the owning company and will not in any manner sell transfer charge or hypothecate or agree to change in any manner the nature of or rights conferred by the said shares or any of them without the written consent of the owning company first had and obtained and will not by any act or omission suffer the said shares to become liable for or liable to be taken in satisfaction of any of the debts duties or obligations of the holding company.

In witness whereof *etc.*

THE SCHEDULE

Part 1 — Shares presently held

I Scrip Certificate No.	II Number of Shares	III Serial Numbers	IV Company	V Dealings	VI Date	VII Authenticating execution
		to				

Part 2 — New or Additional Shares

THE COMMON SEAL *etc.*

SPECIFIC PERFORMANCE—DOUBTFUL TITLE*

The old rule that specific performance of a contract for the sale of land will be refused where the court, though not actually pronouncing the title to be bad, considers it to be too doubtful to be forced upon a purchaser was held still to exist in 1910 (*Re Nichols' and Von Joel's Contract*, [1910] 1 Ch. 43), and no one has suggested that it has since been abrogated. The defence that a title is too doubtful has, however, fallen into some disfavour with the court which, save in exceptional circumstances, has adopted the practice of deciding, in vendor and purchaser proceedings, whether it is good or bad instead of dismissing it as "doubtful", even though the proceedings do not bind third parties.

In *Alexander* v. *Mills* (1870), 6 Ch. App. 124, JAMES, L.J., delivering the judgment of the Court of Appeal, said: "As a general and almost universal rule the court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined". The opening words of the passage quoted show clearly, however, that the rule enunciated is subject to qualification and in *Re Nichols' and Von Joel's Contract* (*supra*) it was held to be excluded in difficult cases of construction where there is a readily available method of obtaining a determination binding on all persons.

In the last-mentioned case title depended upon the construction of an obscure will. A vendor and purchaser summons was taken out and came before NEVILLE, J., who offered to adjourn it to enable the vendors to take out a construction summons on the ground that it was not a matter which ought to be decided between vendor and purchaser, and on refusal of the offer he held that the title was too doubtful to be forced on a purchaser. The vendors appealed and the Court of Appeal made the same offer which was then accepted, the construction summons being decided in favour of the vendors. On the adjourned hearing of the appeal it was held that the vendors ought to pay the costs of the appeal and in the Court below on the ground that they had adopted the wrong procedure, SIR H. H. COZENS-HARDY, M.R., saying: "I should be very sorry to have it supposed that it is my view that upon a vendor and purchaser summons it is not the habit and duty of the court in ordinary cases to construe a will or document forming part of the title, but I also think it is quite plain that when there is real difficulty or doubt in construing a will, and when there is, according to the rules

* By courtesy of *The Law Journal* England.

of court, a very easy mode in which that construction can be determined in such a manner as to bind everybody, it is not right for the court to force a title upon a purchaser which merely may mean that he is buying a law suit".

On the other hand, in *Smith* v. *Colbourne*, [1914] 2 Ch. 533, where the question at issue was whether an agreement, which prevented the statutory period of prescription from beginning to run, created an incumbrance, the Court of Appeal construed a number of written documents in specific performance proceedings. So far as the actual decision goes there was no discrepancy between the decision in that case and that in *Re Nichols' and Von Joel's Contract* as, presumably, the documents in question did not present the "real difficulty or doubt" visualised by SIR H. H. COZENS-HARDY, M.R., but SWINFEN EADY, L.J., cited with approval the passage quoted above from JAMES, L.J.'s judgment in *Alexander* v. *Mills* (*supra*) without calling attention to any possible exceptions thereto or any limitations thereon, and there is, therefore, a certain degree of conflict between *Re Nichols' and Von Joel's Contract* and *Smith* v. *Colbourne*, though this conflict was not recognized by MAUGHAM, J. in *Johnson* v. *Clarke*, [1928] Ch. 847, where both the Court of Appeal decisions were cited. In *Johnson* v. *Clarke* the question was whether a tenant who was in occupation was a tenant from year to year or for a more extensive period and therefore there was no "short cut", such as a construction summons, by which the vendor could clear his title. MAUGHAM, J. held that, in the absence of very great or serious difficulty, it was his duty to ascertain the extent of the tenant's interest in the current proceedings. Before parting from this case it should be added that though the decision was clearly not binding on the tenant all the evidence was before the court which could have been adduced in an action by the vendor against the tenant to determine the validity of the agreement on which the latter relied.

The above was the state of the authorities when the recent case of *Wilson* v. *Thomas*, [1958] 1 All E.R. 871, came before ROXBURGH, J. On the one hand he was faced with the decision in *Re Nichols' and Von Joel's Contract* that difficult questions which can be determined on construction summonses should not be determined in proceedings between vendor and purchaser; on the other by JAMES, L.J.'s proposition in *Alexander* v. *Mills*, and the decision in *Smith* v. *Colbourne* where that proposition was applied; while in *Johnson* v. *Clarke* MAUGHAM, J. had indicated that he might have followed *Re Nichols' and Von Joel's Contract* if suitable procedure had been available, but in the event gave a decision the other way.

Before seeing how ROXBURGH, J. solved the dilemma, it will be well to look at the very curious facts in the case before him. The contract was for the purchase of certain reversionary interests in a will fund and a settlement fund, the will fund having arisen under the will of a testator who gave his residuary estate, after the death of his wife, on trust for a number of named beneficiaries, some of whose shares were settled on protective trusts. The persons named included "Allan Hewit", described as a nephew of the testator. Shortly after the death of the testator all the named persons, other than "Allan Hewit", who survived him, and his nephews Frederick Allan Wilson and Henry Hewit Wilson executed a deed of family arrangement purporting to vary the will by substituting the names of the two last-mentioned nephews for the name "Allan Hewit". The purchaser having refused to complete, the vendor claimed that it was competent for the court in specific performance proceedings to admit such extrinsic evidence as would be admissible in claim under the will to show that in the will "Allan Hewit" referred to two persons.

This ROXBURGH, J. rejected, and his offer of an adjournment pending the hearing of a construction summons having been refused, he made an order declaring that the purchaser was entitled to rescind. *Au fond* he based himself on SIR H. H. COZENS-HARDY, M.R.'s *dictum* in *Re Nichols' and Von Joel's Contract* that where there is real difficulty or doubt in construing a will which can readily be construed on an originating summons it would not be right to allow it to be litigated between vendor and purchaser. Even if the court had come in the specific performance proceedings to the same conclusion on the construction of the will as the parties to the deed of arrangement did, the order would not have bound the beneficiaries under the protective trusts, and, therefore, if the title had been forced on the purchaser he might really have been put in the position of "buying a law suit". The case was, in his Lordship's opinion, a much stronger one than *Re Nichols' and Von Joel's Contract* since it was not a mere question of construction but one which involved the calling of extrinsic evidence to resolve a latent ambiguity. To allow it to be litigated in the action would throw on the purchaser the unfair burden of seeking for evidence amongst a large number of persons, all of whom were strangers to him.

The decision in *Smith* v. *Colbourne* was distinguished on the ground that there it was not necessary or even desirable to call all oral evidence. So far as JAMES, L.J.'s *dictum* in *Alexander* v. *Mills* was concerned ROXBURGH, J. was able to escape its rigour by holding that the duty to ascertain "the law" referred to therein was confined to a duty to ascertain pure law, and not mixed questions of

law and fact, but that even if this were not so the case before him was one in which it would be contrary to natural justice to apply the almost universal rule.

The result seems to be that so far as there is conflict between them *Nichols' Case* is to be preferred to *Smith* v. *Colbourne*. Difficult and doubtful questions of construction ought not to be litigated between vendor and purchaser, and this is particularly the case where the question is one of mixed law and fact, and where the rights of persons not party to the proceedings are involved. On the other hand, ROXBURGH, J. indicated that, in his opinion, where there is a mere question of construction not requiring extrinsic evidence and it is not very difficult the court might not now take the course which was taken in *Nichols' Case*.

CASE NOTES

Charity

Will—bequest for general benefit and general welfare of the children in [S. House]—temporary home for orphans and children abandoned by parents—whether charitable.—By his will a testator devised two houses on trust "to apply the income arising therefrom . . . for the general benefit and general welfare of the children for the time being in [S. House] . . . as a small token of my appreciation of the work carried on at such house . . . I desire that the superintendent for the time being of [S. House] should be consulted with a view to ascertaining his views as to the allocation of the before mentioned income". It was held (LORD EVERSHED, M.R., dissenting) that while a gift for the endowment or maintenance of S. House might be charitable, the present gift "for the general benefit and general welfare" of the children for the time being in S. House was not charitable because the term of the gift permitted the application of income for non-charitable objects, e.g., the purchase of a television set for the benefit of delinquent or refractory children (*Re Cole (deceased)*, *Westminster Bank Ltd.* v. *Moore*, [1958] 3 All E.R. 102).

Will—bequest to named orchestra for so long as it should in the opinion of trustees be engaged in playing orchestral music—most but not all objects charitable—rule against perpetuities—operation of s. 131 of Property Law Act 1928. —By her will a testatrix gave one of five shares of the net income of her estate on the death of the life tenant to the Zelman Memorial Symphony Orchestra for so long as the orchestra, in the opinion of her trustees, should remain a properly constituted body actively engaged in the playing of orchestral music. The orchestra had been formed into a company and all but one of its objects were charitable. It was held that as the property might be applied to non-charitable objects it was not a charity (*Oxford Group* v. *Inland Revenue Commissioners,* [1949] 2 All E.R. 537 applied) but that the gift was valid notwithstanding that the income was payable beyond the limitation of the Rule against Perpetuities because of the operation of s. 131 of the *Property Law Act* 1928,* which provided that no trust should be held invalid by reason that some non-charitable and invalid as well as some charitable purpose was included, but that the trust was to be construed and given effect to as if no application of the trust funds to such non-charitable and invalid purpose had been directed or allowed (*The Trustees Executors and Agency Co. Ltd.* v. *Zelman Memorial Symphony Orchestra Ltd., re Lloyd, deceased,* [1958] V.R. 523).

* N.S.W., see s. 37D of the *Conveyancing Act* 1919-1954.

Lien

Solicitor—divorce suit—whether petitioner's solicitor entitled to absolute or qualified lien.—A petitioner in a divorce suit discharged the firm of solicitors whom he had originally instructed, and instructed J., who took over the papers and gave a written undertaking to respect the first firm's lien. Later the petitioner discharged J. without any misconduct on his part and instructed new solicitors. The petitioner then obtained an order against J. directing him to deliver up to the petitioner's new solicitors all papers in his possession relating to the cause. It was further ordered that J. should be relieved of his undertaking to respect the first firm's lien ([1958] 2 All E.R. 366). On an appeal by J., it was held that J. had an unqualified retaining lien over such papers in the cause as were in his possession, and in this regard divorce proceedings were no different from any other civil litigation, notwithstanding that it was the duty of the court under the *Matrimonial Causes Act* 1950, s. 4, to make a full investigation of the facts, and further, that the court had no jurisdiction to relieve J. of the undertaking given by him to the first firm (*Hughes* v. *Hughes,* [1958] 3 All E.R. 179 C.A.).

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